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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

NGUYEN, TRINH T

ART UNIT

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/694,463	<b>Applicant(s)</b> DENICOLA, ROSEMARIE P.	
	<b>Examiner</b> Trinh T. Nguyen	<b>Art Unit</b> 3644	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on Amend. dated 11/5/08.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) 11-14 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-10 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Information Disclosure Statement***

1. The listing of references in the specification is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609 A(1) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

### ***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1,2,4-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bergman (US 5060420) in view of Tesch (US 3655501).

Bergman discloses a protection device having:

a continuous, non-composite, circumferentially closed tubular, substantially topologically plain, substantially non-rigid sheet liner (14) with an interior side, an exterior side, an integral, non-composite closed bottom end and open top end and a plurality of apertures wherein the apertures are positioned in a pattern which is regular

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and repeating (note that tubular sheet liner (14) is composed of porous material which has a plurality of apertures therein).

Bergman disclose most of the claimed invention except for mentioning that the apertures are elongated ellipse-shaped apertures wherein the apertures are in an alternating anti-parallel orientation.

Tesch teaches that it is old and well known in the art to provide a plurality of apertures, in which the apertures are in an alternating anti-parallel orientation (see Figures 14 and 21), onto a flexible material so as to allow the flexible material to be freely permeable to air, steam and moisture (see lines 50-55 of col. 2). Because both Bergman and Tesch teach the concept of provide a plurality of apertures in a flexible material in an orientation so as to allow the flexible material to be freely permeable to air and/or moisture. It would have been obvious to one having ordinary skill in the art to have modified the apertures of Bergman so as the apertures are in an alternating anti-parallel orientation, in a similar manner as taught in Tesch, since to do so would merely replace one old and well known apertures orientation (in this case, Bergman's apertures orientation) with another art equivalent old and well known apertures orientation (in this case, Tesch's apertures orientation) for allowing the flexible material to be freely permeable to air and/or moisture.

With respect to the ellipse-shaped apertures as claimed in claims 1 and 6-8, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have the apertures of Bergman as modified by Tesch (emphasis on Tesch) in whatever form or shape was desired or expedient, wherein no stated problem is solved

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by having the specific shape as claimed versus the shape taught by the prior art. Note that a change in form or shape is generally recognized as being well known within the level to one of ordinary skill in the art depending on one's intended use and that providing ellipse-shaped apertures is merely a design choice criteria and that one of ordinary skill in the art of making apertures in flexible material would come up with a desirable shape to meet the require design criteria for manufacturing of a flexible material with apertures therein so as to allow the flexible material to be freely permeable to air and/or moisture.

For claims 2, 4, and 5, Bergman as modified by Tesch (emphasis on Bergman) further discloses a closure means wherein the closure means is a tie (16).

For claim 6, Bergman as modified by Tesch (emphasis on Bergman) further discloses a plurality rows of apertures extending generally from the top end to the bottom end (see Figure 1).

For claim 7, Bergman as modified by Tesch (emphasis on Tesch) further discloses a plurality of apertures further comprises a plurality of diagonally oriented apertures (see Figures 14 and 21).

For claim 8, Bergman as modified by Tesch (emphasis on Tesch) further discloses alternating rows of diagonally oriented apertures wherein the diagonal shape is generally oriented from the top end to the bottom end in a left to right direction in a first row and wherein the diagonal orientation is generally oriented from the top end to the bottom end in a right to left direction in a second row (see Figures 14 and 21).

For claim 9, Bergman as modified by Tesch (emphasis on Bergman) further discloses the apertures (note that tubular sheet liner (14) is composed of porous material which has a plurality of apertures therein) are capable of preventing passage of vermin from the exterior side to the interior side and wherein the aperture is capable of permitting passage of water from the exterior side to the interior side.

4. Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Beers (US 1464801).

As described above, the references as applied to claim 1 above disclose most of the claimed invention except for an anchor means.

Beers teaches a concept of using post member (3) as an anchor means to secure member (A) to the ground. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the device of the references as applied to claim 1 above so as to include the use of an anchor means, in a similar manner as taught in Beers, since to do so would allow the user to anchor the device in a more stable position and/or location and thus prevent the device from tipping over.

5. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Stubbmann (US 3415012).

As described above, the references as applied to claim 1 above disclose most of the claimed invention except for the use of a specific material such as plastic to make the tubular sheet liner.

Stubbmann teaches a tubular sheet liner (12) for protecting bulb wherein the liner is made out of plastic (see lines 54-60 of col. 3). It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the tubular sheet liner of the references as applied to claim 1 above so as to make out of plastic, in a similar manner as taught in Stubbmann, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use that is not react when exposed to soil constituents, nutrients or water.

### ***Response to Arguments***

6. Applicant's arguments filed 11/5/08 have been fully considered but they are not persuasive.

7. Applicant's arguments in regard to the restriction requirement is acknowledged. The traversal is on the ground(s) that there will be no additional burden to the Examiner to treat all the claims together. This is not found persuasive because additional claims for additional invention will require additional searches and therefore it is a serious burden to the Examiner. The requirement is still deemed proper and is therefore made FINAL.

8. Applicant further argues that the slits in Tesch are not apertures like the present invention, the Applicant's argument has been acknowledged. However, it is noted that

*The Random House Dictionary*, © Random House, Inc. 2006 (online version at

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<http://dictionary.reference.com>) defines the term "slit" as "a straight, narrow cut, opening, or aperture". Therefore, it is noted that the slit in Tesch is equivalent to Applicant's aperture since the dictionary defines a slit as a straight and narrow aperture.

9. Applicant further argues that one of ordinary skill in the art (i.e. horticulture) would not be familiar with floor covering as disclosed by Tesch, the Examiner respectfully disagrees. It is noted that both the present application and Tesch are concerned with the same concept of providing a plurality of slits/apertures in a flexible material so as to allow the flexible material to be freely permeable to air and/or moisture; therefore, it would have been obvious to one of ordinary skill in the art to utilize the teaching of Tesch in the present application.

### ***Conclusion***

10. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.



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11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Trinh T. Nguyen whose telephone number is (571) 272-6906. The examiner can normally be reached on M-F (1:30 P.M to 10:00 P.M).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Mansen can be reached on (571) 272-6608. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Trinh T Nguyen/  
Primary Examiner, Art Unit 3644  
2/8/09